

October 30,2002

Commissioner Kathleen Abernathy  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: CC Docket Nos. 01-338, 96-98 and 98-147

Dear Commissioner Abernathy :

Broadview Networks, Inc., Eschelon Telecom, Inc., ionex Telecommunications, Inc., Talk America, Inc., Access One. Inc., AmeriMex Communications Corp., eXpeTel Communications, Midwest Telecom of America, Spectrotel, and Vycera Communications, (hereafter, the "UNE-P CLECs") each currently purchases Unbundled Local Switching ("ULS") from Incumbent Local Exchange Carriers ("ILECs") as an Unbundled Network Element ("UNE") combination in order to provide local exchange and exchange access services to customers. Collectively, the UNE-P CLECs provide service utilizing the Unbundled Network Element Platform ("UNE-P") to approximately 500,000 lines. Some of the UNE-P CLECs are switch-based carriers that utilize LNE-P to compliment their own switch-based services, while others provide service exclusively via UNE-P. The UNE-P CLECs as a group provide services using UNE-P to both residential and business customers, and offer such services in the operating territories of each Regional Bell Operating Company ("RBOC"). Thus, the UNE-P CLECs have extensive "hands on" experience in providing competitive telecommunications services through the use of UNE-P, *and* rely on the availability of ULS as a UNE to provide critical services to hundreds of thousands of consumers nationwide. As such, the UNE-P CLECs *and their customers* have a direct and vital interest in the ongoing debate in the above-referenced proceeding concerning the continued availability of UNE-P generally and ULS in particular.

The UNE-P CLECs believe strongly that UNE-P based competition has provided tremendous benefits to consumers. UNE-P has made it feasible for CLECs to provide meaningful competition for residential and small business customers (i.e. the so-called "mass market"). The record is clear that UNE-P has ushered true price competition into the mass market for local exchange services for the first time, and that more than 7 million consumers already have availed themselves of the opportunity to elect UNE-P based local services from CLECs. The UNE-P CLECs believe with equal strength that Sections 251-252 and 271 of the federal Telecommunications Act require as a legal matter that ULS and network combinations continue to be made available by the ILECs.

The UNE-P CLECs are aware of public statements by one or more Commissioners evincing a desire to migrate from UNE-P to CLEC-owned local switching over time. Rest assured that the UNE-P CLECs share that vision -- some have already deployed their

own switches and others are anxious to do so where feasible, both to control access to their customers and to improve their operating margins. Although anxious to provide services using their own switching platforms, the UNE-P CLECs believe that ULS UNE must be available for the foreseeable future to:

1. Facilitate entry and customer acquisition by new competitors;
2. Enable existing competitors to expand services geographically; and
3. Allow ubiquity for CLECs to compete with ILEC offers made to multi-location customers.

This is particularly true in an era when capital is extremely scarce and simply not available for purely speculative expansion of CLEC networks.

Nonetheless, if the Commission is determined to further restrict the availability of UNE-P, contrary to what we perceive as the intent of the Telecommunications Act of 1996 as recently affirmed in the *Verizon* Supreme Court decision, the UNE-P CLECs have considered whether the Commission's current UNE rules could be revised in a fashion that would (i) preserve UNE-P both as a legitimate market entry vehicle, for ongoing customer acquisition and ubiquity, while (ii) ensuring that CLECs migrate to their own switching platform as self-provided switching becomes technically and economically feasible. After considerable analysis and research, the UNE-P CLECs have crafted a proposed plan which strikes a reasonable middle ground by addressing the legitimate concerns of CLECs, ILECs, the Commission, and State regulators alike. Proposed rules that would implement such a plan are attached and respectfully submitted herewith for your consideration. However, in "plain English", below are the major elements of the ULS transition plan proposed by the UNE-P CLECs.

#### *No Federal Preemption*

The UNE Triennial Review proceeding is undertaken solely to implement the federal Telecommunications Act. Therefore, the proposed transition plan should be regarded as establishing *minimum* federal requirements. Nothing should be done to prevent state regulators from creating more expansive requirements as necessary to implement state law.

#### *State Implementation of Federal Standards*

The UNE-P CLECs envision a truly "granular" approach to determining whether impairment exists. Thus, our proposed rules create FCC prescribed procedures and over-arching federal standards, but the detailed factual analysis and implementation is left to state regulators. This approach accounts for the very real geographic differences nationwide in topology, ILEC network configurations, ILEC costs, and the like, and the inevitable impact they have on the feasibility of self-provisioned local switching by CLECs.

#### *Local Equal Access a Prerequisite*

As is clear in the record, current ILEC provisioning of UNE-Loop ("UNE-L") services is grossly inadequate to support large-scale customer conversions. Current ILEC

processes for the migration of lines to UNE-L services simply cannot support the conversion of very large volumes of lines in a timely manner and at a quality of service that is acceptable to CLECs and their customers. Thus, ULS must be available until an ILEC can prove that it has deployed an improved UNE-L process that can effectively handle the migration of large volumes of lines by multiple CLECs in the same geographic area. This would ideally be accomplished by the creation of a fully mechanized local loop provisioning system. but could possibly be satisfied by an equally effective manual batch migration process. Under the plan proposed by the UNE-P CLECs, ILECs could petition State regulators to find that they have created such a local equal access system. If State regulators agree, then the petitioning ILEC could begin the process of limiting the availability of ULS as a UNE.

#### *Competitive Price Levels*

If a UNE-P CLEC migrates to its own switching platform, it still needs to purchase essential facilities from the ILECs. Recurring and non-recurring charges for Unbundled Local Loops ("ULLs"), collocation facilities, and Interoffice Facilities ("IOF") are prime examples. Switch-based competition is not feasible if these costs, in the aggregate, approach the ILEC retail rates. Thus, ILECs would be required to demonstrate to State regulators that their retail rates exceed the costs of these critical wholesale inputs in the aggregate, before any transition away from ULS can begin.

#### *UNE-P Migration Plan*

If the preceding prerequisites for ULS migration are met, then our plan proposes that State regulators could establish LATA-specific local switching self-provisioning thresholds per carrier. Specifically, State regulators would determine (i) the number of lines required to make end office collocation feasible, and (ii) the number of lines served by collocation arrangements required to make switch deployment feasible. Once a state has established those thresholds, ILECs can require CLECs that exceed the thresholds to migrate to their own switching platform. Importantly, such CLECs could continue to utilize ULS for customer acquisition and ubiquity for lines up to the threshold level, both in converted and non-converted end offices.

#### *Timing*

State regulators are provided one year within which to determine the switching feasibility thresholds. National default thresholds are provided for the states, if any, that fail to act. Once an ILEC notifies a CLEC that migration will be required, such CLEC has at least **18** months to deploy its switch and move its customers as required.

#### *Migration Charges*

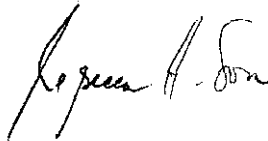
It is critical to recognize that any mandatory customer migration under the plan will be at the behest of the ILEC. Thus, ILECs must be precluded from imposing any migration-related charges upon affected CLECs.

The UNE-P CLECs believe that our proposal accommodates the legitimate interests of all concerned. CLECs may continue to use ULS where self provisioned switching is not yet practical, **and** are given a reasonable amount of time to migrate when self-provisioned

Commissioner Abernathy  
October 30, 2002  
Page 4

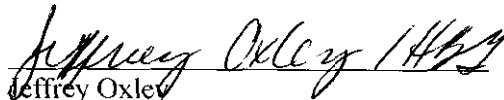
local switching becomes feasible. Yet ILECs are not required to provide ULS indefinitely and without limitation. We hope that our thoughts prove helpful to the Commission as it considers the future treatment of ULS.

Respectfully submitted,

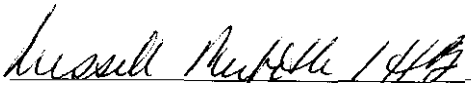


---

Rebecca Sommi  
Vice President, Operations Support  
Broadview Networks, Inc.



Jeffrey Oxley  
Vice President and General Counsel  
Eschelon Telecom. Inc



Russell Merbeth  
Vice President and General Counsel  
ionex Telecommunications, Inc.



George Virall  
Executive Vice President, Business Development  
Talk America, Inc.

Mark Jozwiak 1/4/02

Mark Jozwiak  
Executive Vice President  
Access One, Inc.

Don Aldridge 1/4/02

Don Aldridge  
President  
AmeriMex Communications, Corp.

Wade Spooner 1/4/02

Wade Spooner  
President  
eXpeTel Communications

James Smutniak 1/4/02

James Smutniak  
Vice President  
Midwest Telecom of America

Jack Dayan 1/4/02

Jack Dayan  
President/CEO  
Spectrotel

Derek Gietzen 1/4/02

Derek Gietzen  
President/CEO  
Vycera Communications

## PART 51 – INTERCONNECTION

### Subpart D – Additional Obligations of Incumbent Local Exchange Carriers

\* \* \*

#### § 51.317 Standards for requiring the unbundling of network elements.

\* \* \*

(4) If an incumbent LEC is required to provide nondiscriminatory access to a network element in accordance with § 51.311 and Section 251(c)(3) of the Act under § 51.319 of this section or any applicable Commission Order, no State commission shall have authority to determine that such access is not required, except in accordance with § 51.319(c)(8) or § 51.319(c)(9). A State commission must comply with the standards set forth in this § 51.317 when considering whether to require the unbundling of additional network elements. With respect to any network element which a State commission has required to be unbundled under this § 51.317, the State commission retains the authority to subsequently determine, in accordance with the requirements of this rule, that such network element need no longer be unbundled. This section shall not preclude the enforcement of any regulation, order, or policy of a State commission in accordance with Section 251(d)(3) of the Act.

\* \* \*

#### § 51.319 Specific unbundling requirements.

\* \* \*

(c) *Switching capability.* An incumbent LEC shall provide nondiscriminatory access, in accordance with § 51.311 and section 251(c)(3) of the Act, to local circuit switching capability and local tandem switching capability on an unbundled basis, except as set forth in § 51.319(c)(8), to any requesting telecommunications carrier for the provision of a telecommunications service.

\* \* \*

(6) An incumbent LEC may request a State commission to issue an order declaring that the incumbent LEC has implemented a process to provide any requesting telecommunications carrier with equal access to the incumbent LEC's network elements. A State commission shall not issue an order pursuant to § 51.319(c)(6) unless both:

(A) the incumbent LEC requesting the order proves to the State commission that the process which the incumbent LEC has implemented to provide any requesting telecommunications carrier with equal access to the incumbent LEC's network element is capable of:

- (i) migrating UNE-P lines to UNE-L lines for any requesting carrier in a manner that is timely, efficient, just, reasonable and nondiscriminatory, as well as nondisruptive and transparent to the requesting telecommunication carrier's end users;
- (ii) migrating UNE-P lines to UNE-L lines on a single order for any requesting telecommunications carrier within three business days or within the interval previously established by the relevant state authority;
- (iii) migrating all UNE-P lines to UNE-L lines at the monthly volumes experienced for UNE-P for any requesting telecommunications carrier within 30 calendar days or within the interval previously established by the relevant state authority;
- (iv) processing migration orders with a maximum potential rate of error or trouble reported by the requesting telecommunications carrier equal to 0.99 percent or less; and
- (v) migrating UNE-P lines to UNE-L lines at a cost-effective and cost-based rate;

AND

(B) an independent third-party selected by the State commission certifies after thorough examination and testing that the processes which the incumbent LEC has implemented to provide any requesting telecommunications carrier with equal access to the incumbent LEC's network elements satisfies the criterion enumerated in § 51.319I(6)(A)(i):

(7) An incumbent LEC that has implemented processes to provide any requesting telecommunications carrier with equal access to the incumbent LEC's network elements, as confirmed by a final order issued in accordance with § 51.319(c)(6), may request a State commission to undertake the following analysis to determine the conditions pursuant to which the incumbent LEC may be relieved of its obligation to provide nondiscriminatory access, in accordance with § 51.311, § 51.319(c)(8), § 51.319(c)(9) and section 251(c)(3) of the Act, to local circuit switching capability on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service:

(A) Determine the minimum number of lines that a requesting telecommunications carrier must serve:

- (i) within a LATA before it becomes economically efficient for the requesting telecommunications carrier to install its own switch to serve those lines, which shall be designated the "LATA Line Threshold" or "LLT"; AND
- (ii) within an end office before it becomes economically efficient for the requesting telecommunications carrier to establish a collocation arrangement within that end office, which shall be designated the "Central Office Line Threshold" or "COLT."
- (iii) in making the economic efficiency determinations required under this section, the State commission shall consider, at a minimum, whether the retail monthly rate that the incumbent LEC charges its end user customers exceeds the sum of all of the costs that a requesting

telecommunications carrier would incur to self-provide the service as evidenced by the costs charged by the incumbent LEC, including, but not limited to, the following costs:

- (a) The TELRIC rate for local loop;
- (b) The rate for interoffice facilities;
- (c) The monthly recurring charges for collocation, including but not limited to terminations, rent, and power;
- (d) Any other monthly recurring cost that a requesting telecommunications carrier might incur to self-provide service;
- (e) The non-recurring costs for installing a switch to serve the affected loops;
- (f) The non-recurring charges for establishing a collocation arrangement;
- (g) The non-recurring charges for migration of UNE-P lines to UNE-L lines; and
- (h) Any other non-recurring cost that a requesting telecommunications carrier might incur to self-provide service.

(B) Determine whether a requesting telecommunications carrier serving a number of lines within a LATA that exceeds the LLT, counting only those lines within central offices where the number of lines that the carrier serves exceeds the COLT, would be impaired in its ability to provide the service it seeks to offer if the carrier lacked access to local circuit switching capability on an unbundled basis for those lines that exceed the COLT in that LATA.

(i) In undertaking the impair analysis in accordance with this section, the State commission shall conclude that the incumbent LECs' failure to provide access to local circuit switching capability on an unbundled basis for lines that exceed the COLT in a LATA that exceeds the LLT "impairs" a requesting carrier within the meaning of section 251(d)(2)(B) if, taking into consideration the availability of alternative elements outside the incumbent's network, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer.

(ii) In order to evaluate whether there are alternatives actually available to the requesting telecommunications carrier as a practical, economic, and operational matter, the State commission shall look at the totality of the circumstances associated with using an alternative, considering:

- (a) Cost, including all costs that requesting carriers may incur when using the alternative element to provide the services it seeks to offer;
- (b) Timeliness, including the time associated with entering a market as well as the time to expand service to more customers;
- (c) Quality;
- (d) Ubiquity, including whether the alternatives are available ubiquitously; and
- (e) Impact on network operations.



(8) *Initial Migration.* If a State commission determines in accordance with § 51.319(c)(7) that a requesting telecommunications carrier would not be impaired in its ability to provide the service it seeks to offer if the carrier lacked access to local circuit switching capability on an unbundled basis for lines that exceed the COLT where the number of lines that the carrier serves in a LATA exceeds the LLT, counting only those lines within central offices where the number of lines that the carrier serves exceeds the COLT, then the incumbent LEC may provide any requesting telecommunications carrier serving a number of qualifying lines that exceeds the LLT, counting only those qualifying lines within central offices where the number of qualifying lines that the carrier serves exceeds the COLT, with notice that the local circuit switching capability that the carrier is using to serve qualifying lines within central offices where the number of qualifying lines that the carriers serves exceeds the COLT within a LATA where the carrier is using a number of qualifying lines that exceeds the LLT, will no longer be available on an unbundled basis in accordance with § 51.311 and section 251(c)(3) of the Act for those qualifying lines that exceed the COLT.

(A) A line shall be considered to be a “qualifying line” for the purposes of this section only if the line is a voice grade line supporting a nominal 300 to 3000 Hz signal that can be converted from UNE-P to UNE-L.

(B) The notice permitted under this section must be provided to affected requesting telecommunications carriers at least 18 months before local circuit switching capability will no longer be available on an unbundled basis in accordance with § 51.311 and section 251(c)(3) of the Act for those qualifying lines that exceed the COLT.

(C) Incumbent LECs that elect to provide such notice shall process all initial migration orders placed by any requesting telecommunications carrier affected by such notice, at no charge to that carrier, in accordance with the rates terms and conditions upon which the State commission relied in issuing an order declaring that the incumbent LEC has implemented systems to provide any requesting telecommunications carrier with equal access to the incumbent LEC’s network elements in accordance with § 51.319(c)(6).

(D) In the event that the incumbent LEC violates any of the requirements of this section, the incumbent LEC must pay all affected requesting telecommunications carriers liquidated damages of \$1,000 per day for each affected line and for each day of continuing violations and waive all non-recurring charges associated with the affected lines. The incumbent LEC must pay liquidated damages in accordance with this section within 60 days of receipt of notice by the affected requesting telecommunications carrier.

(E) Upon receipt of notice from an incumbent LEC that local circuit switching capability will no longer be available on an unbundled basis in accordance with § 51.311 and section 251(c)(3) of the Act, a requesting telecommunications carrier can request a waiver of the State commission’s finding of non-impairment based on special circumstances. While the requesting telecommunication carrier’s waiver request is pending, the incumbent LEC must continue to provide nondiscriminatory access to local circuit switching capability on an unbundled basis in accordance with § 51.311 and section 251(c)(3) of the Act.

(F) This section shall not relieve the incumbent LEC of its obligation to provide nondiscriminatory access, in accordance with § 51.311 and section 251(c)(3) of the Act, to UNE-P lines on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service when the qualifying lines that the carrier serves does not exceed the COLT OR exceeds the COLT in a LATA where qualifying lines that the carrier serves does not exceed the LLT.

(9) *Subsequent Migrations.* In a LATA where the local circuit switching capability is no longer available to a requesting telecommunications carrier on an unbundled basis in accordance with § 51.319(c)(8), the incumbent LEC may provide that requesting telecommunications carrier serving a number of qualifying lines within any central office where the number of qualifying lines exceeds the COLT with notice that the carrier must migrate all qualifying lines that exceed the COLT to a collocation arrangement for that central office.

(A) A line shall be considered to be a “qualifying line” for the purposes of this section only if the line can be converted from UNE-P to UNE-L.

(B) The notice permitted under this section must be provided to affected requesting telecommunications carriers at least six months before the qualifying lines that exceed the COLT must be migrated to a collocation arrangement for that central office.

(C) Incumbent LECs that elect to provide such notice shall process all migration orders placed by any requesting telecommunications carrier affected by such notice in accordance with the rates terms and conditions upon which the State commission relied in issuing an order declaring that the incumbent LEC has implemented systems to provide any requesting telecommunications carrier with equal access to the incumbent LEC’s network elements in accordance with § 51.319(c)(6). The charges for processing migration orders placed by any carrier in accordance with the requirements of this section shall not exceed the incremental PIC charge, credited against any non-recurring charges that the carrier paid the incumbent LEC to establish the affected UNE-P lines.

(D) In the event that the incumbent LEC violates any of the requirements of this section, the incumbent LEC must pay all affected requesting telecommunications carriers liquidated damages of \$1,000 per day for each affected line and for each day of continuing violations and waive all non-recurring charges associated with the affected lines. The incumbent LEC must pay liquidated damages in accordance with this section within 60 days of receipt of notice by the affected requesting telecommunications carrier.

(E) Upon receipt of notice from an incumbent LEC that qualifying lines which exceed the COLT must be migrated to a collocation arrangement for that central office, a requesting telecommunications carrier can request a waiver of the State commission’s finding of non-impairment based on special circumstances. While the requesting telecommunication carrier’s waiver request is pending, the incumbent LEC must continue to provide nondiscriminatory access to the affected UNE-P lines on an unbundled basis in accordance with § 51.311 and section 251(c)(3) of the Act.

(F) This section shall not relieve the incumbent LEC of its obligation to provide nondiscriminatory access, in accordance with § 51.311 and section 251(c)(3) of the Act, to UNE-P lines on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service when the qualifying lines that the carrier serves does not exceed the COLT OR exceeds the COLT in a LATA where qualifying lines that the carrier serves does not exceed the LLT.

(10) If a State commission cannot, based on the information available to it, determine the LLT and the COLT consistent with § 51.319(c)(7)(a), then the State commission may elect to establish an interim LLT of 60,000 lines and an interim COLT of 5,000 lines. A State commission that established an interim LLT and an interim COLT shall, within a reasonable period of time thereafter, establish an LLT and COLT on the basis of a determination consistent with § 51.319(c)(7)(A).

(11) A determination by a State commission in accordance with § 51.319(c)(7) that a requesting telecommunications carrier would not be impaired in its ability to provide the service it seeks to offer if the carrier lacked access to local circuit switching capability on an unbundled basis where the number of lines that the carrier serves in a LATA exceeds the LLT, counting only those lines within central offices where the carrier serves a number of lines that exceeds the COLT, shall have no effect on network elements that a requesting telecommunications carrier is currently using, or subsequently requests, in accordance with § 51.311 and section 251(c)(3) of the Act, on an unbundled basis to serve its end user customers:

(A) from a central office where the requesting telecommunications carrier's total number of qualifying lines is fewer than the COLT;

(B) for qualifying lines below the COLT within a central office where the requesting telecommunications carrier's total number of qualifying lines exceed the COLT;

(C) within a LATA where the requesting telecommunications carrier's total number of lines is fewer than the LLT; OR

(D) within a LATA in which the incumbent LEC has elected not to provide notice to the requesting telecommunications carrier in accordance with § 51.319(c)(8)-(9).

(12) This section shall not modify, limit or extend the authority of State commissions in accordance with § 51.317(4).

\* \* \*

## PART 51 – INTERCONNECTION

### Subpart D – Additional Obligations of Incumbent Local Exchange Carriers

\* \* \*

#### § 51.320 Commission action **upon** a State commission's failure to act under § 51.319(c).

(a) If a State commission fails to act to carry out its responsibility under § 51.319(c) in any proceeding or other matter under § 51.319(c), the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under § 51.319(c) with respect to the proceeding or matter and shall act for the State commission.

(b) For purposes of this part, a State commission fails to act if the State commission fails to respond, within 270 days, to a request by an incumbent LEC that the State commission issue an order in accordance with § 51.319(c)(6) or § 51.319(c)(7) or to a request by a requesting telecommunications carrier for waiver in accordance with § 51.319(c)(8)-(9).

(c) Any party seeking preemption of a State commission's jurisdiction, based on the State commission's failure to act, shall notify the Commission in accordance with following procedures:

(1) Such party shall **file** with the Secretary of the Commission a petition, supported by an affidavit, that states with specificity the basis for the petition and any information that supports the claim that the State has failed to act, including, but not limited to, the applicable provisions of the Act and the factual circumstances supporting a finding that the State commission has failed to act;

(2) Such party shall ensure that the State commission and the other parties to the proceeding or matter for which preemption is sought are served with the petition required in paragraph (c)(1) of this section on the same date that the petitioning party serves the petition on the Commission; and

(3) Within fifteen days from the date of service of the petition required in paragraph (c)(1) of this section, the applicable State commission and parties to the proceeding may file with the Commission a response to the petition.

(d) The party seeking preemption must prove that the State has failed to act to carry out its responsibilities under § 51.319(c).

(e) The Commission, pursuant to § 51.319(c), may take notice upon its own motion that a State commission has failed to act. In such a case, the Commission shall issue a public notice

that the Commission has taken notice of a State commission's failure to act. The applicable State commission and the parties to a proceeding or matter in which the Commission has taken notice of the State commission's failure to act may file, within fifteen days of the issuance of the public notice, comments on whether the Commission is required to assume the responsibility of the State commission under § 51.319(c) with respect to the proceeding or matter.

(f) The Commission shall issue an order determining whether it is required to preempt the State commission's jurisdiction of a proceeding or matter within 90 days after being notified under paragraph (c) of this section or taking notice under paragraph (e) of this section of a State commission's failure to carry out its responsibilities under § 51.319(c).

(g) If the Commission assumes responsibility for a proceeding or matter pursuant to § 51.320, the Commission shall retain jurisdiction over such proceeding or matter.

(h) In making any determinations pursuant to § 51.319(c), the Commission shall ensure that such determinations meet § 51.319(c).

October 30, 2002

Commissioner Michael J. Copps  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: CC Docket Nos. 01-338, 96-98 and 98-147

Dear Commissioner Copps:

Broadview Networks, Inc., Eschelon Telecom, Inc., ionex Telecommunications, Inc., Talk America, Inc., Access One, Inc., AmeriMex Communications Corp., eXpeTel Communications, Midwest Telecom of America, Spectrotel, and Vycera Communications, (hereafter, the "UNE-P CLECs") each currently purchases Unbundled Local Switching ("ULS") from Incumbent Local Exchange Carriers ("ILECs") as an Unbundled Network Element ("UNE") combination in order to provide local exchange and exchange access services to customers. Collectively, the UNE-P CLECs provide service utilizing the Unbundled Network Element Platform ("UNE-P") to approximately 500,000 lines. Some of the UNE-P CLECs are switch-based carriers that utilize UNE-P to compliment their own switch-based services, while others provide service exclusively via UNE-P. The UNE-P CLECs as a group provide services using UNE-P to both residential and business customers, and offer such services in the operating territories of each Regional Bell Operating Company ("RBOC"). Thus, the UNE-P CLECs have extensive "hands on" experience in providing competitive telecommunications services through the use of UNE-P, *and* rely on the availability of ULS as a UNE to provide critical services to hundreds of thousands of consumers nationwide. As such, the UNE-P CLECs *and their customers* have a direct and vital interest in the ongoing debate in the above-referenced proceeding concerning the continued availability of UNE-P generally and ULS in particular.

The UNE-P CLECs believe strongly that UNE-P based competition has provided tremendous benefits to consumers. UNE-P has made it feasible for CLECs to provide meaningful competition for residential and small business customers (i.e. the so-called "mass market"). The record is clear that UNE-P has ushered true price competition into the mass market for local exchange services for the first time, and that more than 7 million consumers already have availed themselves of the opportunity to elect UNE-P based local services from CLECs. The UNE-P CLECs believe with equal strength that Sections 251-252 and 271 of the federal Telecommunications Act require as a legal matter that ULS and network combinations continue to be made available by the ILECs.

The UNE-P CLECs are aware of public statements by one or more Commissioners evincing a desire to migrate from UNE-P to CLEC-owned local switching over time. Rest assured that the UNE-P CLECs share that vision -- some have already deployed their

own switches and others are anxious to do so where feasible, both to control access to their customers and to improve their operating margins. Although anxious to provide services using their own switching platforms, the UNE-P CLECs believe that ULS UNE must be available for the foreseeable future to:

1. Facilitate entry and customer acquisition by new competitors;
2. Enable existing competitors to expand services geographically; and
3. Allow ubiquity for CLECs to compete with ILEC offers made to multi-location customers.

This is particularly true in an era when capital is extremely scarce and simply not available for purely speculative expansion of CLEC networks.

Nonetheless, if the Commission is determined to further restrict the availability of UNE-P, contrary to what we perceive as the intent of the Telecommunications Act of 1996 as recently affirmed in the *Verizon* Supreme Court decision, the UNE-P CLECs have considered whether the Commission's current UNE rules could be revised in a fashion that would (i) preserve UNE-P both as a legitimate market entry vehicle, for ongoing customer acquisition and ubiquity, while (ii) ensuring that CLECs migrate to their own switching platform as self-provided switching becomes technically and economically feasible. After considerable analysis and research, the UNE-P CLECs have crafted a proposed plan which strikes a reasonable middle ground by addressing the legitimate concerns of CLECs, ILECs, the Commission, and State regulators alike. Proposed rules that would implement such a plan are attached and respectfully submitted herewith for your consideration. However, in "plain English", below are the major elements of the ULS transition plan proposed by the UNE-P CLECs.

#### *No Federal Preemption*

The UNE Triennial Review proceeding is undertaken solely to implement the federal Telecommunications Act. Therefore, the proposed transition plan should be regarded as establishing *minimum* federal requirements. Nothing should be done to prevent state regulators from creating more expansive requirements as necessary to implement state law.

#### *State Implementation of Federal Standards*

The UNE-P CLECs envision a truly "granular" approach to determining whether impairment exists. Thus, our proposed rules create FCC prescribed procedures and over-arching federal standards, but the detailed factual analysis and implementation is left to state regulators. This approach accounts for the very real geographic differences nationwide in topology, ILEC network configurations, ILEC costs, and the like, and the inevitable impact they have on the feasibility of self-provisioned local switching by CLECs.

#### *Local Equal Access a Prerequisite*

As is clear in the record, current ILEC provisioning of UNE-Loop ("UNE-L") services is grossly inadequate to support large-scale customer conversions. Current ILEC

processes for the migration of lines to UNE-L services simply cannot support the conversion of very large volumes of lines in a timely manner and at a quality of service that is acceptable to CLECs and their customers. Thus, ULS must be available until an ILEC can prove that it has deployed an improved UNE-L process that can effectively handle the migration of large volumes of lines by multiple CLECs in the same geographic area. This would ideally be accomplished by the creation of a fully mechanized local loop provisioning system, but could possibly be satisfied by an equally effective manual batch migration process. Under the plan proposed by the UNE-P CLECs, ILECs could petition State regulators to find that they have created such a local equal access system. If State regulators agree, then the petitioning ILEC could begin the process of limiting the availability of ULS as a UNE.

#### *Competitive Price Levels*

If a UNE-P CLEC migrates to its own switching platform, it still needs to purchase essential facilities from the ILECs. Recurring and non-recurring charges for Unbundled Local Loops ("ULLs"), collocation facilities, and Interoffice Facilities ("IOF") are prime examples. Switch-based competition is not feasible if these costs, in the aggregate, approach the ILEC retail rates. Thus, ILECs would be required to demonstrate to State regulators that their retail rates exceed the costs of these critical wholesale inputs in the aggregate, before any transition away from ULS can begin.

#### *UNE-P Migration Plan*

If the preceding prerequisites for ULS migration are met, then our plan proposes that State regulators could establish LATA-specific local switching self-provisioning thresholds per carrier. Specifically, State regulators would determine (i) the number of lines required to make end office collocation feasible, and (ii) the number of lines served by collocation arrangements required to make switch deployment feasible. Once a state has established those thresholds, ILECs can require CLECs that exceed the thresholds to migrate to their own switching platform. Importantly, such CLECs could continue to utilize ULS for customer acquisition and ubiquity for lines up to the threshold level, both in converted and non-converted end offices.

#### *Timing*

State regulators are provided one year within which to determine the switching feasibility thresholds. National default thresholds are provided for the states, if any, that fail to act. Once an ILEC notifies a CLEC that migration will be required, such CLEC has at least 18 months to deploy its switch and move its customers as required.

#### *Migration Charges*

It is critical to recognize that any mandatory customer migration under the plan will be at the behest of the ILEC. Thus, ILECs must be precluded from imposing any migration-related charges upon affected CLECs.

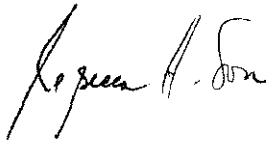
The UNE-P CLECs believe that our proposal accommodates the legitimate interests of all concerned. CLECs may continue to use ULS where self provisioned switching is not yet practical, and are given a reasonable amount of time to migrate when self-provisioned



Commissioner Copps  
October 30, 2002  
Page 4

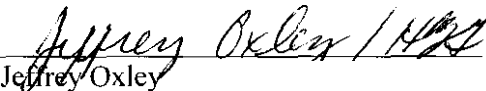
local switching becomes feasible. Yet ILECs are not required to provide ULS indefinitely and without limitation. We hope that our thoughts prove helpful to the Commission as it considers the future treatment of ULS.

Respectfully submitted,

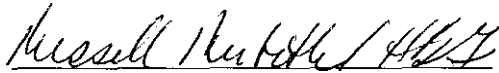


---

Rebecca Sommi  
Vice President, Operations Support  
Broadview Networks, Inc.



Jeffrey Oxley  
Vice President and General Counsel  
Eschelon Telecom, Inc



Russell Merbeth  
Vice President and General Counsel  
ionex Telecommunications, Inc.



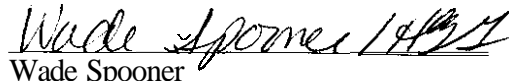
George Vinal  
Executive Vice President, Business Development  
Talk America, Inc.



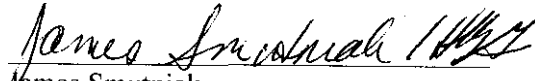
Mark Jozwiak  
Executive Vice President  
Access One, Inc.



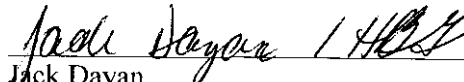
Don Aldridge  
President  
AmeriMex Communications, Corp



Wade Spooner  
President  
eXpeTel Communications



James Smutniak  
Vice President  
Midwest Telecom of America



Jack Dayan  
President/CEO  
Spectrotel



Derek Gietzen  
President/CEO  
Vycera Communications

## **PART 51 –INTERCONNECTION**

### **Subpart D – Additional Obligations of Incumbent Local Exchange Carriers**

\* \* \*

#### **§ 51.317 Standards for requiring the unbundling of network elements.**

\* \* \*

(4) If an incumbent LEC is required to provide nondiscriminatory access to a network element in accordance with 55.1.311 and Section 251(c)(3) of the Act under 55.1.319 of this section or any applicable Commission Order, no State commission shall have authority to determine that such access is not required, except in accordance with § 51.319(c)(8) or § 51.319(c)(9). A State commission must comply with the standards set forth in this §51.317 when considering whether to require the unbundling of additional network elements. With respect to any network element which a State commission has required to be unbundled under this §51.317, the State commission retains the authority to subsequently determine, in accordance with the requirements of this rule, that such network element need no longer be unbundled. This section shall not preclude the enforcement of any regulation, order, or policy of a State commission in accordance with Section 251(d)(3) of the Act.

\* \* \*

#### **§ 51.319 Specific unbundling requirements.**

\* \* \*

(c) *Switching capability.* An incumbent LEC shall provide nondiscriminatory access, in accordance with § 51.311 and section 251(c)(3) of the Act, to local circuit switching capability and local tandem switching capability on an unbundled basis, except as set forth in § 51.319(c)(8), to any requesting telecommunications carrier for the provision of a telecommunications service.

\* \* \*

(6) An incumbent LEC may request a State commission to issue an order declaring that the incumbent LEC has implemented a process to provide any requesting telecommunications carrier with equal access to the incumbent LEC's network elements. A State commission shall not issue an order pursuant to § 51.319(c)(6) unless both:

(A) the incumbent LEC requesting the order proves to the State commission that the process which the incumbent LEC has implemented to provide any requesting telecommunications carrier with equal access to the incumbent LEC's network element is capable of:

- (i) migrating UNE-P lines to UNE-L lines for any requesting carrier in a manner that is timely, efficient, just, reasonable and nondiscriminatory, as well as nondisruptive and transparent to the requesting telecommunication carrier's end users;
- (ii) migrating UNE-P lines to UNE-L lines on a single order for any requesting telecommunications carrier within three business days or within the interval previously established by the relevant state authority;
- (iii) migrating all UNE-P lines to UNE-L lines at the monthly volumes experienced for UNE-P for any requesting telecommunications carrier within 30 calendar days or within the interval previously established by the relevant state authority;
- (iv) processing migration orders with a maximum potential rate of error or trouble reported by the requesting telecommunications carrier equal to 0.99 percent or less; and
- (v) migrating UNE-P lines to UNE-L lines at a cost-effective and cost-based rate;

AND

- (B) an independent third-party selected by the State commission certifies after thorough examination and testing that the processes which the incumbent LEC has implemented to provide any requesting telecommunications carrier with equal access to the incumbent LEC's network elements satisfies the criterion enumerated in § 51.319I(6)(A)(i):

(7) An incumbent LEC that has implemented processes to provide any requesting telecommunications carrier with equal access to the incumbent LEC's network elements, as confirmed by a final order issued in accordance with § 51.319(c)(6), may request a State commission to undertake the following analysis to determine the conditions pursuant to which the incumbent LEC may be relieved of its obligation to provide nondiscriminatory access, in accordance with § 51.311, § 51.319(c)(8), § 51.319(c)(9) and section 251(c)(3) of the Act, to local circuit switching capability on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service:

- (A) Determine the minimum number of lines that a requesting telecommunications carrier must serve:
  - (i) within a LATA before it becomes economically efficient for the requesting telecommunications carrier to install its own switch to serve those lines, which shall be designated the "LATA Line Threshold" or "LLT"; AND
  - (ii) within an end office before it becomes economically efficient for the requesting telecommunications carrier to establish a collocation arrangement within that end office, which shall be designated the "Central Office Line Threshold" or "COLT."
  - (iii) in making the economic efficiency determinations required under this section, the State commission shall consider, at a minimum, whether the retail monthly rate that the incumbent LEC charges its end user customers exceeds the sum of all of the costs that a requesting

telecommunications carrier would incur to self-provide the service as evidenced by the costs charged by the incumbent LEC, including, but not limited to, the following costs:

- (a) The TELRIC rate for local loop;
- (b) The rate for interoffice facilities;
- (c) The monthly recurring charges for collocation, including but not limited to terminations, rent, and power;
- (d) Any other monthly recurring cost that a requesting telecommunications carrier might incur to self-provide service;
- (e) The non-recurring costs for installing a switch to serve the affected loops;
- (f) The non-recurring charges for establishing a collocation arrangement;
- (g) The non-recurring charges for migration of UNE-P lines to UNE-L lines; and
- (h) Any other non-recurring cost that a requesting telecommunications carrier might incur to self-provide service.

(B) Determine whether a requesting telecommunications carrier serving a number of lines within a LATA that exceeds the LLT, counting only those lines within central offices where the number of lines that the carrier serves exceeds the COLT, would be impaired in its ability to provide the service it seeks to offer if the carrier lacked access to local circuit switching capability on an unbundled basis for those lines that exceed the COLT in that LATA.

(i) In undertaking the impair analysis in accordance with this section, the State commission shall conclude that the incumbent LECs' failure to provide access to local circuit switching capability on an unbundled basis for lines that exceed the COLT in a LATA that exceeds the LLT "impairs" a requesting carrier within the meaning of section 251(d)(2)(B) if, taking into consideration the availability of alternative elements outside the incumbent's network, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer.

(ii) In order to evaluate whether there are alternatives actually available to the requesting telecommunications carrier as a practical, economic, and operational matter, the State commission shall look at the totality of the circumstances associated with using an alternative, considering:

- (a) Cost, including all costs that requesting carriers may incur when using the alternative element to provide the services it seeks to offer;
- (b) Timeliness, including the time associated with entering a market as well as the time to expand service to more customers;
- (c) Quality;
- (d) Ubiquity, including whether the alternatives are available ubiquitously; and
- (e) Impact on network operations.

(8) *Initial Migration.* If a State commission determines in accordance with § 51.319(c)(7) that a requesting telecommunications carrier would not be impaired in its ability to provide the service it seeks to offer if the carrier lacked access to local circuit switching capability on an unbundled basis for lines that exceed the COLT where the number of lines that the carrier serves in a LATA exceeds the LLT, counting only those lines within central offices where the number of lines that the carrier serves exceeds the COLT, then the incumbent LEC may provide any requesting telecommunications carrier serving a number of qualifying lines that exceeds the LLT, counting only those qualifying lines within central offices where the number of qualifying lines that the carrier serves exceeds the COLT, with notice that the local circuit switching capability that the carrier is using to serve qualifying lines within central offices where the number of qualifying lines that the carrier serves exceeds the COLT within a LATA where the carrier is using a number of qualifying lines that exceeds the LLT, will no longer be available on an unbundled basis in accordance with § 51.311 and section 251(c)(3) of the Act for those qualifying lines that exceed the COLT.

(A) A line shall be considered to be a “qualifying line” for the purposes of this section only if the line is a voice grade line supporting a nominal 300 to 3000 Hz signal that can be converted from UNE-P to UNE-L.

(B) The notice permitted under this section must be provided to affected requesting telecommunications carriers at least 18 months before local circuit switching capability will no longer be available on an unbundled basis in accordance with § 51.311 and section 251(c)(3) of the Act for those qualifying lines that exceed the COLT.

(C) Incumbent LECs that elect to provide such notice shall process all initial migration orders placed by any requesting telecommunications carrier affected by such notice, at no charge to that carrier, in accordance with the rates terms and conditions upon which the State commission relied in issuing an order declaring that the incumbent LEC has implemented systems to provide any requesting telecommunications carrier with equal access to the incumbent LEC’s network elements in accordance with § 51.319(c)(6).

(D) In the event that the incumbent LEC violates any of the requirements of this section, the incumbent LEC must pay all affected requesting telecommunications carriers liquidated damages of \$1,000 per day for each affected line and for each day of continuing violations and waive all non-recurring charges associated with the affected lines. The incumbent LEC must pay liquidated damages in accordance with this section within 60 days of receipt of notice by the affected requesting telecommunications carrier.

(E) Upon receipt of notice from an incumbent LEC that local circuit switching capability will no longer be available on an unbundled basis in accordance with § 51.311 and section 251(c)(3) of the Act, a requesting telecommunications carrier can request a waiver of the State commission’s finding of non-impairment based on special circumstances. While the requesting telecommunication carrier’s waiver request is pending, the incumbent LEC must continue to provide nondiscriminatory access to local circuit switching capability on an unbundled basis in accordance with § 51.311 and section 251(c)(3) of the Act.

(F) This section shall not relieve the incumbent LEC of its obligation to provide nondiscriminatory access, in accordance with § 51.311 and section 251(c)(3) of the Act, to UNE-P lines on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service when the qualifying lines that the carrier serves does not exceed the COLT OR exceeds the COLT in a LATA where qualifying lines that the carrier serves does not exceed the LLT.

(9) *Subsequent Migrations.* In a LATA where the local circuit switching capability is no longer available to a requesting telecommunications carrier on an unbundled basis in accordance with § 51.319(c)(8), the incumbent LEC may provide that requesting telecommunications carrier serving a number of qualifying lines within any central office where the number of qualifying lines exceeds the COLT with notice that the carrier must migrate all qualifying lines that exceed the COLT to a collocation arrangement for that central office.

(A) A line shall be considered to be a “qualifying line” for the purposes of this section only if the line can be converted from UNE-P to UNE-L.

(B) The notice permitted under this section must be provided to affected requesting telecommunications carriers at least six months before the qualifying lines that exceed the COLT must be migrated to a collocation arrangement for that central office.

(C) Incumbent LECs that elect to provide such notice shall process all migration orders placed by any requesting telecommunications carrier affected by such notice in accordance with the rates terms and conditions upon which the State commission relied in issuing an order declaring that the incumbent LEC has implemented systems to provide any requesting telecommunications carrier with equal access to the incumbent LEC’s network elements in accordance with § 51.319(c)(6). The charges for processing migration orders placed by any carrier in accordance with the requirements of this section shall not exceed the incremental PIC charge, credited against any non-recurring charges that the carrier paid the incumbent LEC to establish the affected UNE-P lines.

(D) In the event that the incumbent LEC violates any of the requirements of this section, the incumbent LEC must pay all affected requesting telecommunications carriers liquidated damages of \$1,000 per day for each affected line and for each day of continuing violations and waive all non-recurring charges associated with the affected lines. The incumbent LEC must pay liquidated damages in accordance with this section within 60 days of receipt of notice by the affected requesting telecommunications carrier.

(E) Upon receipt of notice from an incumbent LEC that qualifying lines which exceed the COLT must be migrated to a collocation arrangement for that central office, a requesting telecommunications carrier can request a waiver of the State commission’s finding of non-impairment based on special circumstances. While the requesting telecommunication carrier’s waiver request is pending, the incumbent LEC must continue to provide nondiscriminatory access to the affected UNE-P lines on an unbundled basis in accordance with § 51.311 and section 251(c)(3) of the Act.

(F) This section shall not relieve the incumbent LEC of its obligation to provide nondiscriminatory access, in accordance with § 51.311 and section 251(c)(3) of the Act, to UNE-P lines on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service when the qualifying lines that the carrier serves does not exceed the COLT OR exceeds the COLT in a LATA where qualifying lines that the carrier serves does not exceed the LLT.

(10) If a State commission cannot, based on the information available to it, determine the LLT and the COLT consistent with § 51.319(c)(7)(a), then the State commission may elect to establish an interim LLT of 60,000 lines and an interim COLT of 5,000 lines. A State commission that established an interim LLT and an interim COLT shall, within a reasonable period of time thereafter, establish an LLT and COLT on the basis of a determination consistent with § 51.319(c)(7)(A).

(11) A determination by a State commission in accordance with § 51.319(c)(7) that a requesting telecommunications carrier would not be impaired in its ability to provide the service it seeks to offer if the carrier lacked access to local circuit switching capability on an unbundled basis where the number of lines that the carrier serves in a LATA exceeds the LLT, counting only those lines within central offices where the carrier serves a number of lines that exceeds the COLT, shall have no effect on network elements that a requesting telecommunications carrier is currently using, or subsequently requests, in accordance with § 51.311 and section 251(c)(3) of the Act, on an unbundled basis to serve its end user customers:

(A) from a central office where the requesting telecommunications carrier's total number of qualifying lines is fewer than the COLT;

(B) for qualifying lines below the COLT within a central office where the requesting telecommunications carrier's total number of qualifying lines exceed the COLT;

(C) within a LATA where the requesting telecommunications carrier's total number of lines is fewer than the LLT; OR

(D) within a LATA in which the incumbent LEC has elected not to provide notice to the requesting telecommunications carrier in accordance with § 51.319(c)(8)-(9).

(12) This section shall not modify, limit or extend the authority of State commissions in accordance with § 51.317(4).



\* \* \*

## **PART 51 – INTERCONNECTION**

### **Subpart D – Additional Obligations of Incumbent Local Exchange Carriers**

\* \* \*

#### **§ 51.320 Commission action upon a State commission's failure to act under § 51.319(c).**

(a) If a State commission fails to act to carry out its responsibility under § 51.319(c) in any proceeding or other matter under § 51.319(c), the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under § 51.319(c) with respect to the proceeding or matter and shall act for the State commission.

(b) For purposes of this part, a State commission fails to act if the State commission fails to respond, within 270 days, to a request by an incumbent LEC that the State commission issue an order in accordance with § 51.319(c)(6) or § 51.319(c)(7) or to a request by a requesting telecommunications carrier for waiver in accordance with § 51.319(c)(8)-(9).

(c) Any party seeking preemption of a State commission's jurisdiction, based on the State commission's failure to act, shall notify the Commission in accordance with following procedures:

(1) Such party shall file with the Secretary of the Commission a petition, supported by an affidavit, that states with specificity the basis for the petition and any information that supports the claim that the State has failed to act, including, but not limited to, the applicable provisions of the Act and the factual circumstances supporting a finding that the State commission has failed to act;

(2) Such party shall ensure that the State commission and the other parties to the proceeding or matter for which preemption is sought are served with the petition required in paragraph (c)(1) of this section on the same date that the petitioning party serves the petition on the Commission; and

(3) Within fifteen days from the date of service of the petition required in paragraph (c)(1) of this section, the applicable State commission and parties to the proceeding may file with the Commission a response to the petition.

(d) The party seeking preemption must prove that the State has failed to act to carry out its responsibilities under § 51.319(c).

(e) The Commission, pursuant to § 51.319(c), may take notice upon its own motion that a State commission has failed to act. In such a case, the Commission shall issue a public notice

that the Commission has taken notice of a State commission's failure to act. The applicable State commission and the parties to a proceeding or matter in which the Commission has taken notice of the State commission's failure to act may file, within fifteen days of the issuance of the public notice, comments on whether the Commission is required to assume the responsibility of the State commission under § 51.319(c) with respect to the proceeding or matter.

(f) The Commission shall issue an order determining whether it is required to preempt the State commission's jurisdiction of a proceeding or matter within 90 days after being notified under paragraph (c) of this section or taking notice under paragraph (e) of this section of a State commission's failure to carry out its responsibilities under § 51.319(c).

(g) If the Commission assumes responsibility for a proceeding or matter pursuant to § 51.320, the Commission shall retain jurisdiction over such proceeding or matter.

(h) In making any determinations pursuant to § 51.319(c), the Commission shall ensure that such determinations meet § 51.319(c).